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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re DESIREE M. et al., Persons Coming  
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

ANGELICA C.,

Defendant and Appellant.

D067728

(Super. Ct. No. J518802B-C)

APPEAL from orders of the Superior Court of San Diego County, Kimberlee A.  
Lagotta, Judge. Affirmed.

Monica Vogelmann, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County  
Counsel, and Daniela Davidian, Deputy County Counsel, for Plaintiff and Respondent.

Angelica C. appeals the juvenile court orders terminating her parental rights to her minor children, Desiree M. and Ricardo M., under Welfare and Institutions Code section 366.26.<sup>1</sup> Angelica contends the court erred by finding the beneficial parent-child relationship exception to adoption did not apply to preclude the termination of her rights. We affirm the orders.

### FACTUAL AND PROCEDURAL BACKGROUND

Angelica's first involvement with the San Diego County Health and Human Services Agency (Agency) was in 2005, when the Agency received a referral indicating Angelica and Pedro E., the father of her oldest son Emmanuel E., were using methamphetamines. Another referral in 2008 involved Angelica's use of methamphetamines and neglect of Emmanuel. During the investigation of the 2008 referral, Angelica reported she was the victim of domestic violence by Pedro. Both referrals resulted in voluntary cases with the Agency and Angelica's participation in services including drug treatment and domestic violence education.

In January 2013, the Agency received its third referral concerning Angelica. She and Pedro were divorced and Angelica was remarried to Jesse M. She and Jesse had two children, Desiree, age four, and Ricardo, 22 months. The referral indicated Angelica and Jesse were abusing drugs and neglecting the minors. Angelica and Jesse both tested negative for drug use and the social worker investigating the referral did not find evidence of drug abuse. The following August, however, the family came to the

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<sup>1</sup> All statutory references are to the Welfare and Institutions Code.

Agency's attention again after Emmanuel called the police and reported that Jesse hit Angelica. As a result, Jesse was taken to a mental health facility and later released without any diagnosis. Shortly after the incident, the Agency's social worker interviewed Emmanuel at school. He reported Desiree and Ricardo had recently been involved in a car accident while being driven by a friend. The minors were not injured, but since the accident Jesse had started acting strange. Emmanuel also told the social worker that he had seen Jesse hit Angelica in the face. The social worker interviewed four-year-old Desiree, who also stated she saw Jesse hit Angelica.

Shortly after the August incident, the Agency received another report of domestic violence between Jesse and Angelica. The two were involved in a physical altercation at a park and Jesse again hit Angelica in the face in front of the three children. Hours after this incident, Angelica called the police who took a report from Angelica at her mother's house. Thereafter, the Agency conducted additional interviews with Emmanuel and Angelica. After the incident Angelica obtained a temporary restraining order, but days later told the social worker she wanted to have the order lifted because she did not need it.

As a result of the domestic violence and Angelica's continued involvement with Jesse, as well as the parents' failure to participate in voluntary services offered to them, on October 7, 2013, the Agency filed petitions in the juvenile court under section 300,

subdivision (b) on behalf of Desiree and Ricardo.<sup>2</sup> The Agency alleged Angelica and Jesse exposed the children to physical violence, placing them at risk of serious harm. In its report for the detention hearing, the Agency recommended the children remain in Angelica's care, that Jesse be provided with supervised visitation and both parents be offered voluntary services. At the hearing, the court followed the Agency's recommendation and permitted the minors to remain in Angelica's custody so long as they lived in her mother's home where Angelica was currently residing with them and not with Jesse.

Before the jurisdictional and dispositional hearing, the Agency learned that Angelica and the children were staying with Jesse at the home of his mother (Desiree and Ricardo's paternal grandmother). When social workers arrived at the home to investigate, Angelica, Jesse, Desiree and Ricardo were present, but Angelica hid herself and Ricardo from the workers. The social workers took Desiree into custody immediately. They returned a few hours later and were able to also detain Ricardo. Both minors were placed at Polinsky Children's Center. A special hearing was conducted and the juvenile court found detention of the minors was necessary. The court also ordered the Agency to assess all available relatives for placement.

After a contested jurisdictional hearing, the court sustained the allegations of the petitions, declared Desiree and Ricardo dependants of the juvenile court and placed them in the home of their paternal grandmother. The court also ordered supervised visitation

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<sup>2</sup> Though not at issue in this appeal, the Agency also initiated dependency proceedings on behalf of Emmanuel.

and reunification services for both parents and set the six-month review hearing for May 21, 2014. Shortly after the hearing, Jesse assaulted Angelica again. Angelica reported the incident to the police, but later refused to testify against Jesse and no charges were pursued.

During the review period Angelica was consistent with visitation, seeing the minors between one and three hours each week. Angelica was also appropriate during her visits with Desiree and Ricardo. However, she was slow to engage in the services required by her case plan. Angelica failed to regularly participate in the parenting and domestic violence programs she was enrolled in and, at the time of the six-month review hearing, was on the verge of being discharged from her therapist. Angelica failed to schedule appointments with the therapist or show up for the appointments she did schedule. In its initial report for the six-month review hearing, the Agency recommended that the children remain in the care of their paternal grandmother and the parents be provided continued reunification services.<sup>3</sup> At Angelica's therapist's suggestion, the Agency also recommended a psychological evaluation for Angelica.

At the May 21, 2014, six-month review hearing, Angelica contested the Agency's recommendation she undergo a psychological evaluation and the continued placement of the minors out of her care. The court set a further hearing for July 8, 2014. Before the hearing, however, counsel for the minors filed a section 388 petition seeking the termination of reunification services for Angelica. The Agency also changed its position

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<sup>3</sup> Jesse did participate in services, but had positive drug tests, was not consistent with visitation and was arrested during the review period.

and submitted a revised report to the juvenile court in July recommending the court terminate reunification services and set a section 366.26 hearing. The court postponed the six-month review hearing to August 7, 2014, to coincide with a hearing on the minors' section 388 petition. In support of its changed position, the Agency's August 7, 2014, report emphasized Angelica's continued involvement with Jesse despite a restraining order against him, and her failure to engage in services or remain in contact with the Agency since its initial six-month review hearing report in May.<sup>4</sup>

At the contested review hearing, the visitation monitor at the center where Angelica's visits were conducted testified that Angelica had missed one visit and her visitation time had been reduced from two hours to one because she was consistently late. After hearing and considering the testimony of Angelica and the social worker assigned to the family as well as counsels' argument, the court issued its order terminating Angelica's and Jesse's reunification services and setting a section 366.26 selection and implementation hearing. The court found the services provided by the Agency to Angelica and Jesse were reasonable, but they had failed to regularly participate in services or make substantive progress in their court ordered treatment plans.

After the termination of reunification services, Angelica continued to have supervised visitation with Desiree and Ricardo, but her visitation became inconsistent. By October 2014, the visitation center had terminated Angelica as a result of excessive

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<sup>4</sup> Jesse also failed to participate in services or maintain regular visitation with the minors. In addition, he was arrested on drug charges in July and, shortly after being released from custody, arrested and taken into custody again on August 1, 2014, for a gang-related crime.

cancellations. In November, the social worker arranged for weekly visits at the children's home with the paternal grandmother. Angelica cancelled one visit and failed to show up for two others. At the one visit Angelica attended, the social worker observed and reported Angelica was appropriate and loving toward Desiree and Ricardo. When the social worker indicated the time period for the visit was up, however, Angelica reacted negatively. Ricardo became anxious when Angelica would not respond when he asked when he would see Angelica next. Thereafter, Angelica's visitation continued to be sporadic and inconsistent. She visited the minors three times, and cancelled or failed to appear at seven other scheduled visits.

In reports for the section 366.26 hearing on February 19, 2015, the Agency's social worker stated the paternal grandmother was committed to adopting the children and in the process of completing an adoption home study. If the grandmother could not adopt the minors, there were 53 families in San Diego County approved to adopt a sibling set matching the characteristics of Desiree and Ricardo, 61 families approved to adopt a child with Desiree's characteristics, and 81 families approved to adopt a child with Ricardo's characteristics. The social worker reported she remained concerned about Angelica's inability to break ties with Jesse. The reports indicated Angelica had continued to foster a relationship with Jesse despite an active restraining order and had asked if Jesse could attend her visits with the minors.

The social worker also reported she had observed all four visits between Angelica and the minors since November. Desiree and Ricardo enjoyed visits with Angelica, but the social worker saw no indication any detriment would result from the termination of

parental rights. Rather, the worker believed the stability, security and permanency created by adoption would benefit the children. At the section 366.26 hearing, the juvenile court received the Agency's reports into evidence and heard the argument of counsel. Angelica's attorney argued the beneficial parent-child relationship exception to adoption applied and a permanent plan of guardianship was the appropriate course. The juvenile court rejected these arguments, finding by clear and convincing evidence the minors were likely to be adopted and none of the statutory exceptions to the termination of parental rights applied. The court terminated parental rights and referred Desiree and Ricardo for adoptive placement.

## DISCUSSION

Angelica contends the juvenile court erred by finding the beneficial parent-child relationship exception to adoption did not apply. She asserts she maintained regular visitation and contact with the minors, had a substantial and positive emotional attachment with them and occupied a parental role in their lives.

### A

After reunification services are terminated, the focus of a dependency proceeding shifts from preserving the family to promoting the best interests of the child, including the child's interest in a stable, permanent placement that allows the caregiver to make a full emotional commitment to the child. (*In re Fernando M.* (2006) 138 Cal.App.4th 529, 534.) At the selection and implementation hearing, the court has three options: (1) terminate parental rights and order adoption as the permanent plan; (2) appoint a legal guardian for the child; or (3) order the child placed in long-term foster care. (*Ibid.*)



"Adoption, where possible, is the permanent plan preferred by the Legislature."  
(*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573 (*Autumn H.*)). If the court finds a child cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds termination of parental rights would be detrimental to the child under one of the specified statutory exceptions. (§ 366.26, subd. (c)(1)(A) & (B)(i)-(vi); *In re Erik P.* (2002) 104 Cal.App.4th 395, 401.) "The parent has the burden of establishing the existence of any circumstance that constitutes an exception to termination of parental rights." (*In re T.S.* (2009) 175 Cal.App.4th 1031, 1039.) Because a selection and implementation hearing occurs "after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

Section 366.26, subdivision (c)(1)(B)(i) provides an exception to the adoption preference if termination of parental rights would be detrimental to the child because "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." Courts have interpreted the phrase " 'benefit from continuing the . . . relationship' " to refer to a parent-child relationship that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would

confer. If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; accord, *In re Jason J.* (2009) 175 Cal.App.4th 922, 936 (*Jason J.*).)

To meet the burden of proof for this statutory exception, the parent must show more than frequent and loving contact, an emotional bond with the child or pleasant visits. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive emotional attachment from child to parent that if severed would result in harm to the child. (*Ibid.*; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.) The exception does not require proof that the child has a " 'primary attachment' " to the parent or that the parent has maintained day-to-day contact with the child. (*In re S.B.* (2008) 164 Cal.App.4th 289, 299; *In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534-1538; *In re Casey D.* (1999) 70 Cal.App.4th 38, 51 (*Casey D.*).)

We review an order terminating parental rights for substantial evidence. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) If, on the entire record, there is substantial evidence to support the findings of the juvenile court, we uphold those findings. We do not consider the credibility of witnesses, attempt to resolve conflicts in the evidence or weigh the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order and affirm the order even if there is substantial evidence supporting a contrary finding. (*Casey D.*, *supra*, 70 Cal.App.4th at

pp. 52-53; *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) The parent has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

## B

Angelica argues the trial court erred by finding there was no beneficial relationship because she "had a substantial, positive, loving, significant mother/child relationship at the beginning of the case" and that this relationship "continued unabated" during her regular and consistent visitation with Desiree and Ricardo. Angelica asserts the termination of this relationship will greatly harm the minors and maintaining this relationship outweighs the benefits of adoption. The juvenile court's findings to the contrary, however, were supported by substantial evidence.

Angelica overstates both the regularity of her visitation with the minors and the strength of her relationship with them. Angelica had regular visitation with the minors from the time they were removed from her care until the time the six-month review hearing was initially scheduled. Thereafter, her visitation was inconsistent at best. Although Angelica's visits with the minors were generally positive, there was no evidence before the juvenile court that Angelica's absence from their daily lives affected them adversely or that the children had such a " 'significant, positive, emotional attachment' " to Angelica that terminating parental rights would result in any harm to them. (*Jason J.*, *supra*, 175 Cal.App.4th at p. 936; *Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) As evidence of the potential harm, Angelica emphasizes the fact that the social

worker stated Desiree appeared sad at the end of visits. In the same sentence, however, the worker noted Desiree and Ricardo "separate happily" from Angelica.

Likewise, Angelica points to the social worker's statement that Ricardo was anxious at the end of the visit the social worker observed in November 2014. The social worker described this as a response to Angelica's failure to comfort Ricardo and not, as Angelica suggests, an indication that Ricardo held a significant emotional attachment to Angelica. As stated, there was no evidence the minors were negatively affected by Angelica's absence from their lives. "A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.)

Further, as described, Angelica failed to take any steps to engage in any of the significant services and resources offered by the Agency to facilitate reunification with the minors. Angelica also continued to communicate with Jesse and place her relationship with him above her children.<sup>5</sup> At the time of the section 366.26 hearing, Desiree and Ricardo were thriving in the home of their paternal grandmother, who was strongly committed to adopting them and was meeting their medical, developmental and emotional needs. The court was entitled to accept the social worker's opinion that the

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<sup>5</sup> For these reasons, Angelica's reliance on *In re Amber M.* (2002) 103 Cal.App.4th 681 is misplaced. In addition to a bonding study showing a primary attachment between the mother in *In re Amber M.* and her three children and other evidence of the negative impact from the mother's absence, the court noted the mother "did virtually all that was asked of her to regain custody." (*Id.* at p. 690.) The same cannot be said of Angelica.

benefits of adoption for these young children outweighed the benefits of maintaining a relationship with Angelica. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 191 [child's interest in stable and permanent home is paramount once a parent's interest in reunification is no longer at issue].) The minors, whose needs could not be met by Angelica, deserve to have their custody status promptly resolved and their placement made permanent and secure. Substantial evidence supported the court's finding the beneficial parent-child relationship exception to adoption did not apply.

#### DISPOSITION

The orders are affirmed.

McCONNELL, P. J.

WE CONCUR:

AARON, J.

IRION, J.